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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H026590

Plaintiff and Respondent,

(Santa Clara County
Superior Court
No. CC314785)

v.

THOMAS MORALES,

Defendant and Appellant.

_____/

Defendant Thomas Morales appeals from a judgment of conviction entered after the trial court found him guilty of possession of a concealed dirk or dagger (Pen. Code, § 12020, subd. (a)).¹ After defendant admitted that he suffered two prior prison terms (§ 667.5, subd. (b)), the trial court sentenced him to 16 months in state prison. On appeal, defendant contends that the trial court erred in deferring his section 17, subdivision (b) motion to reduce his conviction to a misdemeanor until after he served his prison term, thereby losing jurisdiction. We agree and reverse the judgment.

I. Statement of Facts

At approximately 12:20 a.m. on May 24, 2003, Officer Allan De La Cruz was on patrol when he saw defendant riding a bicycle without a headlight. De La Cruz

¹ All further statutory references are to the Penal Code.

detained defendant and asked him if he had any weapons. Defendant replied that he had a knife in his pocket. The officer then removed the knife from defendant's pocket. The knife was approximately 8 1/2 inches long with a 4-inch blade. The knife was not visible until it was removed.

Defendant testified that he had found the knife in the street and put it in his pocket about 10 to 12 minutes before De La Cruz stopped him.

II. Discussion

Defendant contends that the trial court erred in deferring his section 17, subdivision (b) motion until after he served his prison term, thereby losing jurisdiction.

A violation of section 12020, subdivision (a) "is punishable by imprisonment in a county jail not exceeding one year or in the state prison" Where an offense may be punished as either a felony or a misdemeanor, it is designated a "wobbler." (*People v. Statum* (2002) 28 Cal.4th 682, 685.) A wobbler "is deemed a felony unless charged as a misdemeanor by the People or reduced to a misdemeanor by the sentencing court under Penal Code section 17, subdivision (b)." (*Ibid.*)

Defendant's offense was charged as a felony. Before the trial court rendered its verdict, defendant requested that his conviction be reduced to a misdemeanor. The trial court denied the request and convicted defendant of a felony. However, the trial court also stated that it would "remain open to the possibility of a reduction in this case at the time of sentencing should that prove appropriate at the time of sentencing."

Defendant renewed his section 17, subdivision (b) motion at the sentencing hearing. The trial court responded: "All right. The Court has read and considered the report from the Adult Probation Department and I am prepared to follow that recommendation at this time. I am . . . willing to reserve any ruling on the Section 17 motion until such time as Mr. Morales is released from prison. But I will be willing to revisit that issue at a later time if appropriate. I'll just ask that you bring it to the Court's attention when you believe Mr. Morales will qualify for such a request."

Section 17, subdivision (b) provides in relevant part: “When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison.” Thus, “[i]mposition of a prison term, whether or not suspended, render[s] the offense a felony.” (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1267.)

Here the trial court did not rule on the section 17, subdivision (b) motion at the sentencing hearing, but believed that it would be able to do so after defendant was released from prison. However, the trial court lost jurisdiction under section 17, subdivision (b) to reduce defendant’s offense to a misdemeanor when it imposed the prison term. Accordingly, we remand the matter for the trial court to rule on the motion.

The People argue that the trial court’s comments indicated that “it would be willing to consider a ‘section 17(b)’ reduction should it choose to recall the sentence and impose a misdemeanor sentence” under section 1170, subdivision (d). Section 1170, subdivision (d) provides: “When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the Director of Corrections, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Director of Corrections or the Board of Prison Terms, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.” First, the trial court never mentioned section 1170, subdivision (d),

which authorizes the trial court to recall the sentence and resentence the defendant within 120 days of the date of commitment. Second, the trial court stated that it was “willing to reserve any ruling on the Section 17 motion until such time as Mr. Morales is released from prison,” not during the 120-day recall period.

The People also claim that defendant has failed to establish prejudice. They point out that the trial court found defendant guilty of a felony, denied probation, and imposed a prison term. However, the record establishes that the trial court believed it would have another opportunity to consider defendant’s section 17, subdivision (b) motion. Since the trial court deferred ruling on this motion, the matter must be remanded.

III. Disposition

The judgment is reversed. We remand the matter with directions to the trial court to rule on defendant’s section 17, subdivision (b) motion. If the trial court denies the motion, it shall reinstate the judgment. If it grants the motion, it shall resentence defendant.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.